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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

VAROJ NAZARI, Plaintiff and Appellant, v. SET AYRAPETYAN, Defendant and Respondent.	B198778 (Los Angeles County Super. Ct. No. EC037446)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

Troxell & Associates and Richard M. Foster; Law Offices of Vip Bhola & Associates and Vip Bhola for Plaintiff and Appellant.

Veatch Carlson, Mark A. Weinstein and Dawn M. Oster for Defendant and Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts 1 and 3 of the Discussion.

INTRODUCTION

In his personal injury action against defendant Set Ayrapetyan, plaintiff Varoj Nazari obtained a special verdict in his favor. He appeals from the ensuing $53,061.40 judgment and the order denying his new trial motion. At issue in the published portion of this opinion is Evidence Code section 755.5, which renders inadmissible the record of, or testimony concerning, a defendant's medical examination conducted of a plaintiff who is not proficient in English without the aid of a certified interpreter. We hold that section 755.5 does not prohibit testimony of medical examinations that do not involve communication with the plaintiff. Therefore, the court's ruling limiting the testimony of three defense physicians to their observations, results of non-language-dependent tests, and review of plaintiff's physician's records, was not error. In the unpublished portion of this opinion, we affirm the trial court's ruling denying plaintiff's new trial motion on other grounds. Accordingly, we affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On March 27, 2003, defendant invited plaintiff to his house for tea. In the backyard, defendant offered to pick an orange for plaintiff. Defendant stood on a stool to pick the fruit, but lost his balance while reaching too far and fell. Defendant landed on plaintiff, who was leaning over to serve himself tea. The force of defendant's 215 pounds pushed plaintiff's face into the tea service that defendant had placed on a rock. The fall pushed plaintiff's left eye and cheek into the cups and tray. Defendant acknowledged that he had lost his balance on the same stool a "couple [of] times" in the past.

Plaintiff was standing two to three feet from defendant when the latter grabbed the stool to pick the orange. Plaintiff saw the orange tree and the four-legged stool in defendant's hand. Plaintiff testified he did not offer to help defendant when the latter climbed up onto the stool. Nor did he move away. Instead, plaintiff turned to serve himself tea.

Having sustained injuries to his face and eye, plaintiff brought this negligence action against defendant.

After trial, the jury rendered a special verdict finding that defendant was negligent and that his negligence was a substantial factor in causing plaintiff's harm. The jury found plaintiff sustained a total of $75,802 in damages, comprised of:

$25,802 in past economic damages,

$0 future economic damages,

$50,000 in past noneconomic loss, and

$0 in future noneconomic loss.

The jury also found that plaintiff was 30 percent negligent. After subtracting plaintiff's comparative negligence, the trial court awarded plaintiff $53,061.40.

Plaintiff moved for a new trial on the following grounds: (1) inadequate damages; (2) irregularity in the proceedings; and (3) jury misconduct. (Code Civ. Proc., § 657.) The trial court denied plaintiff's new trial motion on all grounds raised by plaintiff and ruled on objections raised to six juror declarations. Plaintiff's appeal followed.

Additional facts will be discussed in connection with the relevant issues below.

DISCUSSION

The standard of review of the denial of a motion for new trial is as follows: " '[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and [] the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our

obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.'. . . Prejudice is required: '[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error.' [Citation.]" (*Sherman v. Kinetic Concepts, Inc*. (1998) 67 Cal.App.4th 1152, 1160-1161.)[1]

[[End published portion.]]

1. *The damages were not inadequate*.

On a motion for new trial based on the grounds of insufficiency of the evidence or inadequacy of damages, the trial court may reweigh the evidence and draw reasonable inferences of its own (*Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 617); on review, we do not. (*Ibid.*) "[O]ur power *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. [Citations.]" (*Ibid.*)

Plaintiff first contends that the damages award was disproportionate to the damages sustained by him and so the trial court erred in denying his new trial

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[1] We take a slight detour to make an important point about appellate briefing. While it is the duty of the appellate court in reviewing the denial of a new trial motion to review the entire record, on appeal it is manifestly "the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing *exact page citations*. [Citations.]" (*Bernard v. Hartford Fire Ins. Co*. (1991) 226 Cal.App.3d 1203, 1205, italics added, citing Cal. Rules of Court, rule 8.204(a)(1)(C), former rule 15(a).) Plaintiff's single citation to a reporter's transcript with block page references, for example, "RT Vol 6, 2480-2501," frustrates this court's ability to evaluate *which facts* a party believes support his position, particularly when a large portion of that citation referred to points that appeared to be irrelevant. Our task in setting out the facts has been severely hampered by plaintiff's failure to comply with rule 8.204(a)(1)(C). (*Spangle v. Farmers Ins. Exchange* (2008) 166 Cal.App.4th 560, 564, fn. 3.) Instead of striking the brief, however, we have chosen to disregard defects and consider the brief as if it were properly prepared. (Cal. Rules of Court, rule 8.204(e)(2)(C).)

motion pursuant to Code of Civil Procedure sections 657, subdivision (5) and 662.5, subdivision (a). Plaintiff contends that considering the lack of evidence of contributory negligence, the evidence of his "severe and permanent injuries," and that his economic damages were significantly more than zero, the damage award was "grossly insufficient." We disagree.

a. *There was evidence to support the jury's finding that plaintiff was comparatively negligent.*

Plaintiff contends there was no evidence of his comparative fault. We review the jury's apportionment of fault for substantial evidence. (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.) "[T]he jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility: 'These same considerations apply to the jury's apportionment of fault under comparative negligence rules.' " (*Ibid.*)

Plaintiff's description of the testimony to argue there is "no conflicting evidence as to fault apportionment . . . ." completely omits to discuss other evidence of his fault. The jury was instructed from CACI No. 401, that a person can be negligent "by acting or by *failing to act*" (italics added) and from CACI No. 405, that defendant claimed that plaintiff's harm was caused in whole or in part by plaintiff's own negligence. A person is negligent if he or she fails to do something that a reasonably careful person would do in the same situation. The jury heard *plaintiff's* testimony that he was aware that defendant had offered plaintiff fruit and was aware of the stool in defendant's hand. Additionally, although plaintiff testified at trial that he was not aware of defendant's plans for the stool immediately prior to the accident, defense counsel read to the jury from plaintiff's deposition testimony that defendant was not using the stool as a chair; instead in plaintiff's words, defendant "wanted to get fruit off the tree" and that he needed to use the stool to pick the fruit. What is most important is that the jury heard plaintiff testify that he was standing within two to three feet of defendant but did not move away or offer to help defendant when the latter climbed onto the

stool. To be sure, the jury could infer, as plaintiff insists, that defendant was planning to offer plaintiff the stool to sit on. But, the jury could also reasonably conclude from this evidence that plaintiff was aware that defendant could fall while reaching for the fruit, but neither moved out of defendant's way, nor offered to help defendant. It appears that the jury drew the latter inference. Therefore, substantial evidence supports the jury's apportionment of fault.

b. *The evidence of plaintiff's physical and mental injuries*

Plaintiff argues that he presented evidence of physical damages that far exceed the jury award. In particular, he argues that he presented evidence that established "optic nerve damage" and "loss of vision in the left eye," chronic sinusitis, major depression, and temporomandibular joint dysfunction, among other things.

Viewing the evidence as we are required, it shows that plaintiff presented the testimony of ophthalmologist Dr. Haroutun Hovanesian, neurophysiologist Dr. Roger Bertoldi, ear, nose, and throat (ENT) Dr. Vahan Ananian, and psychologist Levon Jernazian, Ph.D. in support of his injuries. That evidence shows that plaintiff suffered a fracture to the floor of his left eye socket and had 50 to 60 percent damage to the optic nerve and 20/200 vision, double vision, a cataract, and an enlarged pupil. He suffers from a major depression, had a deviated septum, and temporomandibular joint disorder (TMJ).

In contrast, defendant presented the evidence of Dr. Rodrigo Torres at Los Angeles County-USC Medical Center who treated plaintiff two days after the accident. Dr. Torres examined plaintiff's left and right eyes to see whether there was optic nerve injury from the fracture that occurred to the orbital floor of his left eye socket. The vision in the right eye tested normal. The vision in the left eye was 20/150, and when plaintiff used a "pinhole chart," the vision in his left eye was 20/60. Dr. Torres diagnosed "diplopia," or double vision, when plaintiff

looked towards his left or upwards, and a cataract in the left eye.[2] That is, plaintiff could see well enough out of the left eye to detect some double vision. A cataract can be caused within two days of a trauma. But, Dr. Torres did not document any suspicion of a traumatic cataract in his assessment of plaintiff and it would be highly irregular, he testified, for him to overlook a traumatic occurrence in a trauma patient. The doctor explained that a fracture to the eye orbit typically does not affect visual acuity. He did not detect direct trauma to the eyeball itself. A funduscopic examination revealed nothing abnormal in the left eye. He found that neither eye had detectable color vision defects or any abnormality in the optic nerve function. Dr. Torres detected no afferent pupillary defects in either the right or left eye. The CT Scan he saw did not show that air had seeped into plaintiff's eye socket. Although the afferent pupillary defect test detected a notable difference in pupil size, that test revealed *no optic nerve injury*.

Dr. Torres clarified his deposition testimony by explaining that there were signs of trauma to the *eye area* but he did not know that the eyeball itself suffered trauma directly. Possibly, the fracture caused what he diagnosed as "subconjunctival hemorrhage and pupillary size discrepancy." Dr. Torres found no *"actual injury on the eyeball that indicated some sort of object penetrating the eye or hitting the eye directly*." (Italics added.)

Dr. David Wallace, a defense ophthalmologist, examined plaintiff a year and two weeks after the injury. Plaintiff walked into Dr. Wallace's office with a kleenex over his left eye. Dr. Wallace found it "fishy, odd, suspicious, curious that [plaintiff] would be behaving in a fashion more as though this were an acute injury than that this was something a year old." Dr. Wallace used an eye chart that does not require literacy in English. Based on the chart, plaintiff read at 20/60 with his right eye and 20/200 with his left eye. However, the doctor was "strongly

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[2] Dr. Torres testified that he diagnosed a nuclear sclerotic cataract, one of the most common types of cataract changes that can be caused by trauma.

suspicious that [plaintiff] might be exaggerating or embellishing or trying to persuade [the doctor] that perhaps his level of visual impairment was more severe than it honestly was." Plaintiff's pupils were normal. Dr. Wallace tested and found "no apparent abnormality of the optic nerve head or the retina . . . ." Had there been traumatic injury to the optic nerve in March 2003, by April 2004, when Dr. Wallace saw plaintiff, there would have been " 'retrograde atrophy' of damaged nerve fibers," and "pallor of the optic nerve head." Based on his examination and testing, Dr. Wallace concluded that "there was no evidence of any injury to the optic nerve, and furthermore, that there were a lot of suspicions about claims and exaggerations, but *no medical evidence to support an . . . assertion . . . of profound reduction in vision in the left eye*." (Italics added.)

Plaintiff claimed to suffer a light sensitivity. Both Dr. Torres and Dr. Wallace diagnosed a small cataract in plaintiff's left eye, which Dr. Wallace believed was a preexisting condition and which explained some small asymmetry in the appearance of the lenses of plaintiff's eyes.

Dr. Edward Joseph O'Connor reviewed the other doctors' reports including the results of a flash VEP test[3] conduct by another doctor on plaintiff. Dr. O'Connor agreed that plaintiff presented no physical signs of optic nerve injury.

As for plaintiff's TMJ claim, his own ENT, Dr. Ananian, testified that he saw plaintiff in April 2004 and again in 2005, and *plaintiff did not complain of TMJ*. The first time plaintiff mentioned difficulty in the TMJ area was in July 2006, *more than three years after the accident*. Meanwhile, defendant's ENT, Dr. Murray Grossan, opined that plaintiff's many dental problems were not caused by the accident because there was no record from the accident of teeth being knocked out. Plaintiff's deviated nasal septum could be easily corrected Dr. Grossan opined, with medication or irrigation rather than surgery.

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[3] See footnote 4 *infra*.

Turning to plaintiff's emotional sequelae, his psychologist diagnosed plaintiff with major depression based on the injury and symptoms he suffered. But defendant's expert, psychiatrist Brian Paul Jacks, M.D., testified that plaintiff was not depressed in a clinical psychiatric way. Plaintiff did not have a diagnosis of a mental disorder or depression, although he is sad. Dr. Jacks diagnosed plaintiff as "malingering or intentionally faking on a willful basis in pursuit of financial gain." The causes of plaintiff's sadness preexisted his injury: Dr. Jacks explained that plaintiff had a difficult time as an immigrant and experienced problems getting and keeping a job so that his financial situation is difficult. Plaintiff also supports his parents and had broken up with a girlfriend of several years. Then came the accident.

In summary, plaintiff presented evidence of his facial, ocular, neuro-ocular, and psychiatric injuries. But, the testimony of Drs. Torres, Wallace, Grossan, and O'Connor provided evidence from which the jury could reasonably conclude that plaintiff did not suffer "optic nerve damage," or a direct blow to the eye, and that the reduced vision in his left eye was not caused solely by the accident, but by an earlier onset cataract and bad vision. The jury also heard from defendant's psychiatric expert that plaintiff was a malingerer and not clinically depressed. Plaintiff first mentioned TMJ three years *after* the accident. There was substantial evidence to justify the jury's finding that plaintiff's injuries were not as severe as he claimed and therefore, to support the trial court's denial of plaintiff's new trial motion.

c. *Loss of future earnings evidence*

Plaintiff contends, without specific citation to the record, that he adduced evidence through his economic expert, Gary Barsegian, that the special damages exceeded $564,000.

The evidence shows that plaintiff's 2001 gross income was $3,939. In 2002, he earned $5,000. In 2003, when the accident occurred and plaintiff worked only a portion of the year, he earned $7,200. Plaintiff's own expert, Gary

Barsegian, noted that this was all the information about his income that plaintiff had supplied to his own witness.

With respect to past economic damages, while the jury did not make any specific apportionment in its award of $25,802, it is not unreasonable to assume that some portion of the $25,802 was for loss of past earnings, given the paucity of plaintiff's past earnings.

As for future economic damages, Barsegian testified that plaintiff made *more money after the accident* than he had made before. Defendant's forensic economist, David Weiner, was in accord. Plaintiff testified in deposition that his doctor told him he would be out of work for three months. Weiner calculated that three months of work was worth $766 to plaintiff in 2003. But, Weiner did not calculate future loss of earnings because *plaintiff returned to work and "was making a lot more money and, to* [*Weiner's*] *understanding, still is making a lot more money than he ever made in the past*." (Italics added.) Although plaintiff might not feel well, Weiner calculated that the injury had no impact on plaintiff's future earnings.

Therefore, although there was substantial evidence that plaintiff sustained injuries, the injuries did not affect his vision in a way that prevented him from working as he had before the accident. While Barsegian testified it was reasonably probable, based on United States Labor Department statistics, that plaintiff would earn $24,000 per year, the jury could have rejected this testimony in light plaintiff's actual income in the years 2001 to 2005. Furthermore, the jury heard both plaintiff's and defendant's witnesses testify that plaintiff was making more money after the accident than he did before, making a future damage award unnecessary. Accordingly, there was no ground for increasing the damage award with the result that plaintiff was not prejudiced and so the trial court did not abuse its discretion in denying plaintiff's new trial motion on that ground.

[[Begin published portion.]]

2. The trial court did not violate Evidence Code section 755.5 by limiting the testimony of defense witnesses Drs. Wallace, O'Connor, and Grossan to observable facts, non-language-dependent tests, and review of plaintiff's physician's records.

Evidence Code section 755.5 requires: "During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, *an interpreter shall be present to interpret the examination in a language that the person understands*." (§ 755., subd. (a), italics added.) The interpreter must be certified according to Government Code requirements. (*Ibid.*) *"The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.*" (§ 755.5, subd. (c), italics added.)

Plaintiff is not proficient in English. Drs. Wallace, O'Connor, and Grossan examined plaintiff for the defense while a friend of plaintiff's translated. Because the interpreter was not certified, plaintiff moved in limine to preclude the testimony of the three physicians for violation of Evidence Code section 755.5. Nonetheless, plaintiff stipulated that Dr. Wallace could testify. Concluding that Evidence Code section 755.5 precluded admission of "anything that involves the language for communication," the court ruled that Drs. O'Connor and Grossan could not testify about conversations they had with plaintiff or any statement plaintiff made. However, the court allowed the doctors to testify about what they found in their review of the medical records, their observations, and their opinions resulting therefrom and as to opinions reached in the Independent Medical Examination. On appeal, plaintiff contends that the trial court's ruling violated section 755.5 of the Evidence Code.

Research has revealed no cases addressing the meaning or scope of Evidence Code section 755.5. In interpreting a statute, we apply longstanding rules. " 'Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. [Citation.] We begin by examining the statutory language, giving the words their usual and ordinary meaning. [Citation.]" (*Bostick v. Flex Equipment Co., Inc*. (2007) 147 Cal.App.4th 80, 116.) "If the language of a statute is unambiguous, the plain meaning governs and it is unnecessary to resort to extrinsic sources to determine the legislative or voters' intent. [Citation.]" (*Id*. at p. 107.) That is, " '[i]f there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations.] If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we " 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" [Citations.]' [Citation.]" (*Id*. at pp. 116-117.)

The language of Evidence Code section 755.5, above quoted is plain. It clearly bans the admission of medical records or medical examinations that defendants or insurance companies conduct for purposes of determining damages in a civil action without the aid of a certified interpreter when the plaintiff is not English-proficient. (*Id*. at subds. (a) & (c).) The statute does not appear to preclude the records or examinations conducted on behalf of the *plaintiff*, even absent a certified interpreter.

Plaintiff asks us to construe Evidence Code section 755.5 to preclude testimony about and records of medical tests for which language or communication is unnecessary to the evaluation and an interpreter is not called upon to translate. He asserts that all medical examinations require

communication. We disagree with plaintiff's construction of the statute because it ignores the realities of certain medical examinations.

Logically, the statute prevents the admission of evidence of a defense examination based on a miscommunication. But, not all medical examinations are language-dependent. For example, a phlebotomist can draw and evaluate a plaintiff's blood without ever speaking with the plaintiff. A doctor can silently test a patient's reflex. In the area of criminal law, fingerprinting, photographing, drawing blood, or taking measurements, do not violate an accused's Fifth Amendment privilege against self-incrimination (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1111, citing *Schmerber v. California* (1966) 384 U.S. 757, 763-764) because the privilege protects " 'compelled testimonial or communicative disclosures by an accused, but not [] "real" or "physical" evidence derived from him.' [Citations.]" (*Verdin, supra,* at p. 1111.) While the language of Evidence Code section 755.5 appears more broadly to preclude admission of all records and examinations of a plaintiff conducted in violation of that statute, without reference to or exception for communication, we do not think the Legislature intended the statute to be so wide-ranging as plaintiff suggests. Where no words are exchanged, it would be meaningless to bar admission of the phlebotomist's record and examination of the blood sample, or the results of a reflex test, merely because a certified interpreter had not been present. A holding that Evidence Code section 755.5 precludes testimony about medical examinations that do not require any communication with the plaintiff would be absurd because no translation would be necessary. We avoid construing a statute in a way that would lead to absurd results. (*California Ins. Guar. Assn. v. Workers' Comp. Appeals Bd*. (2004) 117 Cal.App.4th 350, 362.) Accordingly, we hold that Evidence Code section 755.5 does not prohibit admission into evidence of the record of, or testimony concerning, evidence derived from tests or examinations that require no communication with the plaintiff. The trial court did not err in allowing defendant's physicians to testify about those records and examinations of plaintiff

which, although conducted without the aid of a certified interpreter, did not require any conversation with plaintiff.

As a cautionary note, it is only reasonable to require plaintiff to alert the defense to the need for a certified interpreter under Evidence Code section 755.5 as early in the litigation as possible so that prophylactic measures may be taken. To do otherwise, would promote sandbagging and gamesmanship.

With this conclusion in mind, we address the testimony of Drs. Wallace, O'Connor, and Grossan seriatim.

First, plaintiff cannot be heard to challenge Dr. Wallace's testimony for violation of Evidence Code section 755.5 because plaintiff specifically stipulated that Dr. Wallace would be able to testify even though a certified interpreter had been absent during his examination. It is a longstanding principle of appellate law that where a party by its own conduct induces the commission of an error, it may not claim on appeal that the judgment should be reversed because of that error. (*Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 842.)

Recognizing this stipulation, plaintiff attacks a portion of Dr. Wallace's testimony discussing the results of his colleague Dr. Kim's examination of plaintiff using an eye chart. However, improperly admitted evidence only requires reversal or modification when it is reasonably probable a result more favorable to the complaining party would have been reached absent the error. (Cal. Const., art. VI, § 13 [no judgment shall be set aside on the ground of evidentiary error unless error resulted in miscarriage of justice; Code Civ. Proc., § 475 [reviewing court must disregard nonprejudicial error and presume trial court error nonprejudicial]; see *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.) As plaintiff acknowledges, Dr. Kim's eye examination was only "*one* of the bases for his [Dr. Wallace's] opinion that [plaintiff] was faking." (Italics added.) Indeed, Dr. Wallace discussed a number of other factors that led him to conclude that plaintiff was exaggerating his injury, none of which relied on communication with

plaintiff. In particular, Dr. Wallace testified that he became suspicious upon first meeting plaintiff because plaintiff acted as though his injury were acute by walking into Dr. Wallace's office with a tissue over his left eye, even though this meeting occurred *more than a year after the accident*. Thus, Dr. Wallace's suspicions were aroused by observable body language. Also, Dr. Wallace related his findings based on his funduscopic, microscopic, and opthalmoscopic examinations, the afferent pupillary defect test, and a simple test using a mirror, none of which required communication with plaintiff. And Dr. Wallace discussed plaintiff's treating physician's findings based on his records and examinations. Where plaintiff's physicians' records do not fall within the scope of Evidence Code section 755.5, defendant's doctors' review of those records does not violate the statute. Accordingly, even if Dr. Wallace's reference to Dr. Kim's examination fell outside the scope of the stipulation, the testimony was cumulative of other admissible testimony, and hence not prejudicial. (*Sherman v. Kinetic Concepts, Inc., supra,* 67 Cal.App.4th at p. 1161.)

Next, plaintiff challenges Dr. O'Connor's testimony. Dr. O'Connor testified about his review of reports and examinations of plaintiff's expert and treating physicians and repeated the negative findings with respect to optic nerve injury. He also reviewed the same VEP test[4] results that plaintiff's own experts had used. Plaintiff's witness, Dr. Bertoldi, testified that the VEP test is not dependent on thought, is completely objective, and can be used on comatose

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[4] A Visual Evoked Potential (VEP) and Visual Evoked Response (VER) tests evaluate optic pathways and determine optic nerve injury. The tests look at the response to a flash of light stimulus that generates an electrical response in the retina. The light is translated into an electrical impulse that travels to the occipital lobe. A recording electrode is placed on the back of the head over the occipital lobe to measure the electrical response to the light flash. A normal flash V.E.R. indicates that the light flash is being normally transmitted through a patient's pathways to the occipital lobe and so all optic nerve pathways are working.

patients to determine whether they have any cortical function. Hence, Dr. O'Connor's testimony did not violate Evidence Code section 755.5.[5]

Finally, plaintiff challenges the admission of Dr. Grossan's testimony about his own visual evaluation of plaintiff's teeth, temporomandibular joint, and nasal cavity, and about conclusions he reached upon review of the medical records submitted by plaintiff's witnesses. As with Drs. O'Connor and Wallace, Dr. Grossan's opinions were derived from plaintiff's doctors' examinations or from extrinsic, observable phenomena, not from communications Dr. Grossan had with plaintiff or with an interpreter. Therefore, his testimony did not contravene Evidence Code section 755.5. Even if the trial court erred in admitting Dr. Grossan's testimony that plaintiff's dental problems were caused by poor hygiene, the admission did not prejudice plaintiff and hence does not require reversal. By the time Dr. Grossan was called to the stand, plaintiff's own expert, Dr. Ananian, had already testified that plaintiff had not claimed to suffer from temporomandibular joint pain until *more than three years after the accident*. Thus, Dr. Grossan's testimony was cumulative and manifestly not prejudicial.

For the foregoing reasons, we conclude that plaintiff may not be heard to complain about the admission of Dr. Wallace's testimony because he stipulated to it. We further conclude, notwithstanding the absence of a certified interpreter during plaintiff's visits with them, that the admission of Drs. Wallace's, O'Connor's, and Grossan's testimony did not violate Evidence Code section 755.5, either because those doctors testified about medical examinations of plaintiff conducted by plaintiff's own physicians or because they relied on tests or examinations that are not language- or communication-dependent. The portion of Dr. Wallace's testimony that did violate section 755.5, because based on his

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[5] Plaintiff's remaining contentions concerning Dr. O'Connor's testimony went merely to the weight of his testimony. (*Howard v. Owens-Corning* (1999) 72 Cal.App.4th 621, 633.)

communication with plaintiff, did not prejudice plaintiff because it was cumulative. Accordingly, reversal is not required.

[[End published portion.]]

3. *There was no evidence of juror misconduct such as would justify reversal*.

Plaintiff contends that jury misconduct resulted in unfairness at trial. For this contention, he relied on the declaration of Juror Jaffe. In response, defendant objected to numerous portions of Juror Jaffe's declaration and proffered the declarations of five other jurors.

a. *The law*

Evidence Code section 1150, subdivision (a) reads, "Upon an inquiry as to the validity of a verdict, *any otherwise admissible evidence* may be received as to *statements made, or conduct, conditions, or events occurring*, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such* statement, conduct, condition, or event *upon a juror* either in influencing him to assent to or dissent from the verdict *or concerning the mental processes* by which it was determined." (Italics added.)

It is also well settled that " ' "a presumption of prejudice arises from *any* juror misconduct. . . . However, the presumption may be rebutted by proof that no prejudice actually resulted." ' [Citation.] ' "A denial of a motion for new trial grounded on jury misconduct implies a determination by the trial judge that the misconduct did not result in prejudice." ' [Citation.]" (*English v. Lin* (1994) 26 Cal.App.4th 1358, 1364.)

In ruling on a new trial motion, the trial court conducts a three-step inquiry. (See *People v. Dorsey* (1995) 34 Cal.App.4th 694, 703.) First, the court determines the admissibility of the affidavits supporting the motion, and excludes inadmissible portions. Second, the court decides whether the facts establish misconduct. Third, the court determines whether the misconduct is prejudicial.

(*Ibid.*) "Prejudice exists if it is reasonably probable that a result more favorable to the complaining party would have been achieved in the absence of the misconduct." (*Hasson v. Ford Motor Co*. (1982) 32 Cal.3d 388, 415.)

b. *Application to the facts*

The court ruled on the admissibility of portions of Juror Jaffe's declaration and of the declarations of Jurors Beck, Mason, Carabes, Balderrama, and Huppert submitted by defendant in opposition to the new trial motion. Plaintiff does not challenge those rulings and so they stand.

What remains of those declarations are the following several contentions. First, Juror Jaffe declared that during a break in the trial, Juror Beck "told me [Juror Jaffe] that he [Juror Beck] had already made up his mind about the incident, and that as far as he was concerned, we would be done in 20 minutes." Cautioned not to make up his mind before deliberating, Juror Jaffe declared that Juror Beck responded, " 'I don't give a damn.' " However, as Juror Beck observed in his declaration, Juror Jaffe brought this conversation to the trial court's attention. The court conducted an investigation, interviewing Jurors Jaffe, Beck, and another. Juror Beck told the trial court he was leaning in one direction, but he felt he could keep an open mind and consider all the evidence. Later, Juror Beck declared that he had advised the court that he felt he could be fair and that his mind was still open and could change depending on the evidence. He denied he stated he had already made his mind up or that deliberations would be short. Juror Beck "absolutely state[d]" that he would not have said, " 'I don't give a damn,' " as he would never use such language. Thus, the court heard from the jurors and apparently believed Juror Beck would be fair. In reviewing a trial court's order denying a motion for new trial based on juror misconduct (Code Civ. Proc., § 657, subd. (2)), "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination.

[Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) Given that the jury deliberated and that Juror Beck participated in that deliberation, we conclude that the trial court properly found no prejudice here.

Next, Juror Jaffe stated that the jury did not look at the field of vision and VER/VEP test results admitted into evidence. However, Jurors Beck, Mason, Carabes, and Balderrama, all declared that the exhibits were passed around and jurors looked at them. By denying the new trial motion, the trial court impliedly believed these four jurors over Juror Jaffe, a credibility determination we must accept. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 582.) We conclude plaintiff has failed to demonstrate misconduct in considering the test results.

Third, Juror Jaffe declared that the jury refused to deliberate or examine past and future damages, or pain and suffering. All five of the jurors whose declarations were submitted by defendant contradicted Juror Jaffe on each specific point raised by her, indicating that according to their recollections, the deliberations proceeded differently. We conclude that the trial court's implicit conclusion that plaintiff failed to demonstrate juror misconduct was not error.

Having thoughtfully considered argument, read all of the papers, and weighed all of the evidence, the trial court here manifestly exercised its discretion in denying plaintiff's new trial motion. (*County of Riverside v. Loma Linda University* (1981) 118 Cal.App.3d 300, 323.)

[[Begin published portion.]]

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.